SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1030

DANIEL McMANN, Warden of Clinton Prison, Dannemora, New York,

Petitioner,

against

WILLIAM DAVIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, the Warden of Clinton Prison, Dannemora, New York, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the case of *United States of America, ex rel. William Davis* v. *McMann.* The judgment was entered on October 26, 1967. On November 21, 1967, upon application by petitioner, the Court of Appeals stayed issuance of its mandate to discharge the respondent unless he were promptly retried, pending application to this Court for a writ of certiorari.

Citations to Opinions Below

The opinion of the United States District Court for the Northern District of New York granting the respondent's application for a writ of habeas corpus is reproduced as

Appendix "A" to this petition. The opinion of the United States Court of Appeals for the Second Circuit affirming the order of the District Court (2-1) is reproduced as Appendix "B" to this petition. The order of the United States Court of Appeals for the Second Circuit dated November 22, 1964 staying the issuance of its mandate is reproduced as Appendix "C" to the petition.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Question Presented

Does the Sixth Amendment right to counsel enunciated by this Court in *Gideon* v. *Wainwright* extend to a state criminal defendant a constitutional right to inexplicably discharge retained counsel after trial has commenced, to refuse an offer by the Court of appointed counsel, and to insist that the trial be continued until he can obtain counsel satisfactory to him?

Statement of the Case

The respondent was convicted in the New York Supreme Court, Kings County on October 24, 1962 after a trial by jury of the crimes of robbery in the first degree, grand larceny in the first degree and assault in the second degree. Respondent was sentenced on February 14, 1963 as a second felony offender to a term having as its minimum thirty (30) years and a maximum of sixty (60) years.

During the five months preceding his trial, respondent had been represented continuously by retained counsel. The case was called for trial on October 16, 1962 and the jury selection commenced. The jury was selected with the

respondent's counsel participating but it was not sworn that day because of defense counsel's objection to a juror for cause. The Court requested defense counsel to return to Court the next morning with legal authority for counsel's challenge.

The next day, October 17, 1962, counsel was asked for her legal cause for the challenge to the juror but counsel responded that she had been sick the previous evening. However, the Court informed counsel that it had looked up the law and in its discretion would grant the challenge any way although it was not sure the respondent was entitled to it. At this point respondent's counsel informed the Court that respondent's family asked counsel to withdraw from the case. The respondent then told the Court he wished to "fire" his retained attorney. The jury was selected and outside of the jury's presence a colloquy ensued between the Court and defense counsel in which the Court informed the respondent that he may proceed either with his counsel or if he desires he may proceed himself.

The jury returned to the Courtroom and the prosecution opened to the jury after which the Court then recessed the case. Thereafter a further colloquy ensued between respondent's counsel and the Court which finally resulted in the Court permitting defense counsel to withdraw.

Since respondent was now without counsel the Court asked respondent if he could afford retained counsel. The respondent said he did not have the money to retain one but that his family would retain one and "when they send him to me, and I see that he is adequate to defend my case properly, I will accept him."

The case was continued to the next day and respondent's brother appeared and the Court was informed he did not have time to get a reputable lawyer. The jury was excused on the morning of October 18, 1962 until Monday

morning, October 22 and the Court advised respondent that in the next four days he would either have to get a lawyer or proceed by himself.

On Monday morning respondent's brother appeared without counsel and the Court offered respondent a lawyer of the Legal Aid Society but respondent refused the offer of assigned counsel.

The Court granted respondent another two-day adjournment until Wednesday, the 24th.

On the 24th respondent neither obtained counsel nor altered his refusal to have assigned counsel. The trial proceeded with the respondent participating in the trial. He called his own witnesses and indeed, the Court helped secure his requested witnesses. At the time respondent requested the Court to aid in securing witnesses the Court again offered respondent assistance of counsel which was again refused. The respondent made his summation and after the jury deliberated less than an hour the respondent was found guilty.

The conviction was unanimously affirmed by the Appellate Division of the New York Supreme Court, Second Department on the ground that "under the circumstances, the defendant [respondent] waived his right to counsel and was not deprived of a fair trial . . ." (citations omitted). *People* v. *Davis,* 21 App. Div. 2d 681, 250 N.Y.S. 2d 375. Leave to appeal to the New York Court of Appeals was denied by Judge (now Chief Judge) Fuld on July 13, 1964.

The respondent thereafter applied for a federal writ of habeas corpus on the sole ground that he was denied his constitutional right to be represented by counsel at his state trial. Respondent's application for the writ was granted by the District Court on the ground that respondent was not accorded his constitutional right to counsel by being given a reasonable opportunity to retain counsel of his own choice.

The Court of Appeals for the Second Circuit, over a year after argument was heard, affirmed in a 2-1 decision (MOORE, C. J. *dissenting*).*

Reason for Granting the Writ

The decision below presents an unwarranted expansion of the Sixth Amendment guarantee to a right to counsel.

The opinion below creates a serious distortion of the Sixth Amendment right to counsel enunciated by this Court in *Gideon* v. *Wainwright*, 372 U. S. 335 which will result, if not ruled upon by this Court, in a dislocation and abuse of the state judicial administration.

Although the state trial judge has been vulnerably exposed in the past to the manipulation of the right to counsel on one hand, and the often antagonistic but "correlative right" to defend *pro se* on the other (*Adams* v. *United States ex rel. McCann*, 317 U. S. 269; *United States* v. *Plattner*, 330 F. 2d 271 [2d Cir.]), *United States ex rel. Maldonado* v. *Denno*, 348 F. 2d 12 (2d Cir.); *Releford* v. *United States*, 309 F. 2d 706 (9th Cir.), the decision below adds a new and confusing alternative: the right of a defendant to insist upon counsel that satisfies him in the wake of an inexplicable discharge by him of retained counsel once the trial has commenced and after his refusal of a Court appointed counsel. *Compare People* v. *Hubbard*, 77 Ill. App. 2d 14, 222 N. E. 2d 145 *with United States ex rel. Higgins* v. *Fay*, 364 F. 2d 219 (2d Cir.).

Although the majority below grounded its determination that respondent was not accorded his right to counsel on the assertion of the trial judge's abuse of discretion in

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* While the appeal was *sub judice* Judge Moore moved that all the judges of the Court consider the case *in banc*. The Judges refused *in banc* consideration, Chief Judge Lumbard and Judge Moore, dissenting.

failing to give respondent adequate continuances to retain counsel, *but see Ungar* v. *Sarafite,* 376 U. S. 575, a decision based upon such nebulous criteria, propounded by a federal habeas corpus court on a case-by-case analysis and disposition, many years after the fact, wholly fails to establish any concrete guideline for the state trial judge embodied in the less sedate world of a heated state criminal trial.

The additional variant combinations and permutations created by this third choice now made available to the state criminal defendant necessarily requires the clarification of the law by this Court for the trial judge.

As the dissenting Circuit Judge classically illustrated below:

> "Unless the law for the trial judge is clarified, the pattern for the Davises of the future is clear. 'I want a lawyer.' 'I won't accept assigned or Legal Aid counsel.' 'I can't afford to pay for the kind of counsel I desire.' 'If at any time I don't have "complete confidence" in my lawyer, the trial must cease until I get another lawyer and remember, Mr. Judge, if I have to proceed with a lawyer, I can always claim that I have a constitutional right to represent myself.'"

This Court in *Townsend* v. *Sain,* 372 U. S. 293 found it appropriate "to elaborate the considerations which ought to properly govern the grant or denial of evidentiary hearings in federal habeas corpus proceedings". *Id.* at 310.

Similarly here, this Court should fashion proper guidelines for the trial judge in order to preserve the sound judicial administration of justice so severely endangered by the strategic patterns now available to state criminal defendants as recognized by both the majority and dissenting opinions below under the guise of reliance upon the Sixth Amendment right to counsel.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, New York, December 21, 1967.

Respectfully submitted,

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